

May 18, 2017

**VIA EMAIL AND FIRST CLASS MAIL**

Federal Election Commission  
Office of Complaints Examination  
and Legal Administration  
Attn. Mary Beth deBeau, Paralegal  
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Washington, DC 20436  
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Re: **MUR 7238**

To the Office of Complaints Examination and Legal Administration:

I write in response to the complaint recently filed by Mr. Kerry D. Bowers with the Federal Election Commission, MUR 7238 (the "Complaint" or "Compl."), asserted against *USA Today* and journalists Catalina Camia and David Jackson (the "Respondents").

The Complaint is frivolous and should be expeditiously dismissed. The challenged *USA Today* news report is encompassed by the so-called "press exception" and therefore does not constitute an "expenditure" or a "contribution" within the meaning of the Federal Election Campaign Act (the "Act") and/or Commission regulations. See 52 U.S.C.S. § 30101(9)(B)(i); 11 CFR 100.73; 11 CFR 100.132; see also, e.g., Advisory Opinions 2016-01, 2005-16, 2004-07 & 2000-13.

**The Complaint**

Mr. Bowers alleges that he was a candidate for the Republican Party presidential nomination. See Compl. Ex. C. (*Running for President, really?* THE LAS VEGAS SUN). He alleges that "through a news report" authored by journalists Camia and Jackson, and published by *USA Today*, it was inaccurately stated that Texas Senator Ted Cruz was the first candidate to declare for the Republican presidential nomination. Compl. p. 1. According to Mr. Bowers, he and some fifty-four other individuals had already declared for the Republican nomination prior to Mr. Cruz, and thus "there was factually incorrect information in the subject article." *Id.* Mr. Bowers contends the *USA Today* report discussing Mr. Cruz's candidacy should have contained "an acknowledgement that there were 55 other Republican candidates" including him. *Id.* p. 2. See also *id.* ("Such coverage, in the opinion of the complainant, did not require each candidate to be named, only an acknowledgement that there were 55 other Republican candidates.").

The Complaint describes *USA Today* as "a widely-circulated and reputable news source" and, as a result, the challenged report omitting mention of Mr. Bowers' candidacy was supposedly a "contribution" by the Respondents to the candidacy of Mr. Cruz in violation of federal election law. *Id.* See also *id.* p. 1 ("The statement in the news report alleged as a contribution was as

follows, 'The Texas Republican [Mr. Cruz] will be the first candidate to officially declare a 2016 run for the White House, though several more are likely to be close behind him.'"). Mr. Bowers waited more than two years after the news report was published to file his Complaint. Compl. Ex. A (noting March 22, 2015 publication date).

In short, Mr. Bowers' complaint contends that a news report published by a newspaper of general circulation constitutes a "contribution" within the meaning of election law if it omits acknowledgement of each one of the numerous candidates for a given federal office.

## Controlling Legal Precedent

Respondents are aware of no legal support for the proposition that the Commission can regulate, nor aspires to regulate, *bona fide* news media entities who are accused of failing to give sufficient publicity to candidates for political office. This is true regardless of whether the Complaint contends that the news media coverage is "factually incorrect" or otherwise omits information the candidate desires to see published. Compl. p. 1. Mr. Bowers' contention here would turn the First Amendment on its head. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."). There are numerous other cases which stand for this fundamental constitutional principle.<sup>1</sup>

In any event, the Act and Commission regulations establish that the Complaint has no merit whatsoever. Specifically, the terms "contribution" and "expenditure" include any gift of money or "anything of value" for the purpose of influencing a Federal election. 52 U.S.C.S. § 30101 (8)(A) and (9)(A); 11 CFR 100.52(a) and 100.111(a). However, there is a long-standing exception for "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]" 11 CFR 100.73, 100.132; see also 52 U.S.C.S. § 30101(9)(B)(i). This is the "press exception" as it is commonly known.

<sup>1</sup> As the Commission has observed, the House report on the 1974 amendments to the Act emphasized the statute was not intended to "limit or burden in any way the first amendment freedoms of the press" and would assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). See also Advisory Opinion 2005-16, at p. 6 ("The Commission notes that an entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office.") (citing *First General Counsel's Report*, MUR 5440).

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As aptly summarized in Advisory Opinion 2005-16 at page 4:

The Commission has applied a two-step analysis to determine whether the press exception applies. First, the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations. *See, e.g.*, Advisory Opinions 2004-07, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, and 1996-16. Second, in determining the scope of the exception, the Commission considers: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its "legitimate press function"). *See Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2004-07, 2000-13, 1996-48, and 1982-44.

Two considerations in applying this analysis include whether the entity's materials are available to the general public and are comparable in form to those ordinarily issued by the entity. *See Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Opinion 2000-13 (concluding that a website covered by the press exception was "viewable by the general public and akin to a periodical or news program distributed to the general public.").

## Conclusion

Applying the Commission's analytical framework, the Respondents here obviously qualify as press entities. *USA Today's* website and its print publication are available to the general public and clearly fall within the category of a newspaper, its online equivalent, and/or a periodical publication as described in the Act and Commission regulations. Even a cursory examination of [www.usatoday.com](http://www.usatoday.com) establishes that its primary function is to provide news and information. The Complaint itself concedes, as it must, that the challenged news report was "***made by a widely-circulated and reputable news source.***" Compl. p. 2 (emphasis added); *see also id.* ("Political injury occurred ***when a reputable news source, the respondent*** . . .") (emphasis added).

*USA Today's* ownership is a matter of public record with the Securities and Exchange Commission – its ultimate parent is the publicly traded company Gannett Co., Inc. – and thus *USA Today* is not owned or controlled by any political party, political committee, or candidate. *See* <http://investors.gannett.com/>; *see also* <http://marketing.usatoday.com/about> ("Through its unique visual storytelling, USA TODAY delivers high-quality and engaging content across print, digital, social and video platforms. An innovator of news and information, we reflect the pulse of the nation and serve as the host of the American conversation — today, tomorrow and for

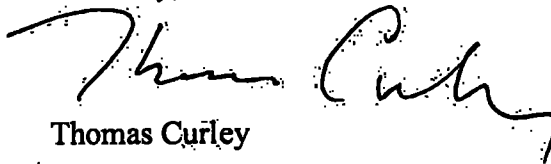
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decades to follow. We reach nearly three million readers daily, and our mobile applications attest to more than 23 million downloads on mobile devices. USA TODAY is owned by Gannett Co., Inc. (NYSE: GCI.); *accord, e.g., Brookfield Communs., Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999) ("One interested in today's news would do well visiting 'usatoday.com,' which features, as one would expect, breaking stories from Gannett's *USA Today*."); *In re Briscoe*, 448 F.3d 201, 210 n.6 (3d Cir. 2006) ("*USA Today*, a daily newspaper with a national readership, ran a front-page story regarding the withdrawal of diet drugs, [their] effects, and the response by various organizations throughout the United States[.]").

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The Commission has repeatedly held that organizations engaging in journalistic activities similar to those undertaken by the Respondents here shelter within the press exemption. *See, e.g.,* Advisory Opinion 2004-07, at p. 6 ("The Commission considers posting news stories, commentaries, and editorials on a press entity's website to be within the entity's legitimate press functions. Accordingly, posting this information on MTV's website would not violate 2 U.S.C. 441b."); Advisory Opinion 2016-01, at p. 3 ("Ethiq's website and app will provide news and information about candidates and businesses to users, through both curated and original news content. Ethiq will employ journalists to produce original content and will retain editorial control of that content, similar to the way in which traditional magazine and newspaper editors generate and manage the content of their publications, and also similar to the way that the requestors in Advisory Opinion 2000-13 (iNEXTV) and Advisory Opinion 2005-16 (Fired Up) determined what content would appear on their websites. The Commission therefore concludes that Ethiq is a press entity under the first step of the media exemption test."). *See also* Advisory Opinion 2005-16; Statement of Reasons in MURs 5540, 5545, 5562 & 5570 (CBS Broadcasting) (July 12, 2005); Factual and Legal Analysis re MUR 5928 (Kos Media) (September 4, 2007).

I have written at length to emphasize the controlling precedent in this area, precedent which mandates the dismissal of the Complaint at the earliest opportunity. There is no legal or factual basis to believe that a violation of election law could have occurred. Accordingly, the Respondents respectfully request that the Complaint be dismissed expeditiously.

Sincerely,



Thomas Curley